

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
 by LISA MADIGAN, Attorney General)
 of the State of Illinois,)
)
 Complainant,)
)
 v.)
)
 SKOKIE VALLEY ASPHALT CO., INC.,)
 an Illinois Corporation, EDWIN L. FREDERICK,)
 JR., Individually and as Owner and President of)
 Skokie Valley Asphalt Co., Inc., and)
 RICHARD J. FREDERICK, Individually)
 and as Owner and Vice President of Skokie)
 Valley Asphalt Co., Inc.,)
)
 Respondents.)

PCB 96-98
(Enforcement – RCRA)


NOTICE OF FILING

TO: Mr. David S. O'Neill, Esq.
Mr. Michael B. Jawgiel, Esq.
5487 North Milwaukee Avenue
Chicago, Illinois 60630-1249

Ms. Carol Webb, Hearing Officer
Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274

PLEASE TAKE NOTICE that I have today filed **Complainant's Response to Respondents' Motion for Sanctions**, with the Office of the Clerk of the Illinois Pollution Control Board, a true and correct copy of which is attached hereto and herewith served upon you.

PEOPLE OF THE STATE OF ILLINOIS,
by LISA MADIGAN, Attorney General
of the State of Illinois

BY: 

 MICHAEL C. PARTEE
 Assistant Attorney General
 Environmental Bureau/North
 188 West Randolph Street, Suite 2000
 Chicago, Illinois 60601
 Tel: 312.814.2069
 Fax: 312.814.2347
 E-Mail: mpartee@atg.state.il.us

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COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR SANCTIONS

Complainant, the PEOPLE OF THE STATE OF ILLINOIS ("People"), by LISA MADIGAN, Attorney General of the State of Illinois, hereby responds to Respondents', SKOKIE VALLEY ASPHALT CO., INC., EDWIN L. FREDERICK, JR., and RICHARD J. FREDERICK, Motion for Sanctions. In support of their response, the People state as follows:

1. Respondents Motion for Sanctions should be stricken on procedural grounds or denied on substantive grounds. Procedurally, the motion for sanctions does not comport with the clear and unambiguous pre-hearing schedule set forth in the Board's September 7, 2006 Order and the requirement to attempt to informally resolve discovery disputes before seeking Board intervention set forth in the Hearing Officer's February 8, 2006 Order. Substantively, the Motion for Sanctions seeks extraordinary relief without stating any legal or factual basis and should be denied because it is without merit.

Relevant Procedural Background

2. In terms of procedural background, Respondents' Motion for Sanctions is based on serious misstatements and omissions of the record in this proceeding. The discovery dispute on which Respondents' Motion for Sanctions is based can be boiled down to a single paragraph (Resp. Motion for Sanctions ("Motion") at 3, ¶13), wherein Respondents make the following statements:

In its Order of November 11, 2005, the Board refused to uphold the People's objection to discovery. Order at 9. The Board allowed the Respondents thirty days from the date of the Order to further respond to each objection. The Board also stated that it would direct the hearing officer to reserve ruling on the Respondents' Motion to Compel until the time for additional response is lapsed. Id.

3. The Motion for Sanctions then omits about nine months of relevant procedural history from November 2005 through September 2006. (Resp. Motion at ¶¶13-15.)

4. Contrary to Respondents' representations, there exists no Board Order of November 11, 2005 in this proceeding and the Board did not refuse to uphold the People's discovery objections. On November 17, 2005, the Board ruled as follows (Nov. 17, 2005 Order at 8 (underline added)):

The respondents' motion to strike the People's objections to discovery is denied. The People are entitled to file discovery objections under Sections 101.618(h) and 101.620(c) of the Board's procedural rules, and raised proper objections thereunder.

5. Regarding Respondents' motion to compel, the Board further ruled as follows (Nov. 17, 2005 Order at 9 (underline added)):

As to the respondents' motion to compel, the Board agrees with the assertions of the People that the respondents did not adequately respond to the People's objections, or attempt to informally resolve the dispute before seeking Board intervention. In various pleadings, the respondents provide general argument, but do not specifically address the objections made by the People. For example, the

respondents argue that a portion of the objections by the People are "so poorly argued that they defy response by the respondents." Mot. to Comp. at 5. Such an assertion does little to assist the Board in reaching a proper determination, and only serves to increase the contentiousness that is evidenced by the many pleadings in this matter.

However, instead of upholding the People's objections to discovery, the Board will allow the respondents 30 days from the date of this order to further respond to each objection. Accordingly, the Board will direct the hearing officer to reserve ruling on the respondents' motion to compel until the time for additional response is lapsed.

6. On December 19, 2005, Respondents filed a response to the People's discovery objections.

7. On December 28, 2005, the People filed a reply to Respondent's response to the People's objections, along with a motion for leave to reply. Also on December 28, 2005, due to the myriad discovery disputes being brought by Respondents directly to the Board without any prior attempt to informally resolve differences with the People, the People filed a second motion for protective order asking that Respondents' attorneys be required to participate in a full and good faith conference with the People's attorneys regarding any further discovery dispute prior to seeking Board intervention.

8. On February 8, 2006, the Hearing Officer granted the People's second motion for protective order as follows (Feb. 8, 2006 Order at 1-2 (underline added)):

Complainant's motion for protective order asks that respondents' attorneys be required to participate in a full and good faith conference with complainant's attorneys regarding any further discovery dispute prior to seeking Board intervention. Respondents' motion to strike offered no compelling argument on which to grant that motion, thus the motion to strike is denied. The parties are directed to make every effort to get through the discovery process with no further involvement from the Board or the hearing officer. Accordingly, the hearing officer grants the motion for protective order. In any motion, objection, or other filing related to any discovery problem, respondents' attorneys must relate the measures taken to resolve the problem with complainant's attorneys before the filing of the motion.

9. Respondents' attorneys have never complied with the Hearing Officer's Order of February 8, 2006. Consistent with their failing in this regard, Respondents' Motion for Sanctions does not relate any measures taken to resolve alleged discovery problems with the People's attorneys before its filing.

10. It is against this procedural background that the Respondents seek the extraordinary remedy of sanctions for unsubstantiated and vague discovery violations by the People.

Applicable Legal Standard for the Imposition of Sanctions

11. Respondents' Motion for Sanctions does not set forth the legal standard for sanctions and is not supported by any Board precedent. The only authority cited in Respondents' Motion for Sanctions is Illinois Supreme Court Rule 219 (Resp. Motion at 5), which is not the controlling rule on sanctions in this proceeding.

12. The Board (and Courts, for that matter) has "broad discretion" in determining the imposition of sanctions. *See Freedom Oil Co. v. IEPA*, PCB 03-54, 2006 WL 391850, at *8 (Feb. 2, 2006). In exercising this broad discretion, the Board considers such factors as the relative severity of the refusal or failure to comply; the past history of the proceeding; the degree to which the proceeding has been delayed or prejudiced; and the existence or absence of bad faith on the part of the offending party or person. *Id.* These factors are contained in Board Procedural Rule 101.800(c) (35 Ill. Adm. Code 101.800(c)), which is the controlling rule in deciding whether to impose sanctions in a Board proceeding.

Respondents' Motion for Sanctions Should Be Stricken On Procedural Grounds

13. Respondents' Motion for Sanctions is based on alleged discovery violations. On its face, it is a discovery pleading. The Board's September 7, 2006 Order is clear as to how such

pleadings are to be treated. The Board ruled that “[d]iscovery pleadings, including replies to the objections, that are not addressed by the schedule will not be allowed.” (Sept. 7, 2006 Order at 8.) Moreover, when Respondents’ attorney suggested that he would file a Motion for Sanctions during the October 5, 2006 Hearing Officer status conference, the Hearing Officer advised Respondents’ attorney that such a motion was not provided for in the pre-hearing schedule and any such argument could be made at hearing. The Hearing Officer further advised that, to the extent Respondents’ still maintained objections to the People’s discovery, such objections were due by October 5, 2006. Respondents waited until October 11, 2006 and then filed their Motion for Sanctions anyway. As a threshold issue, Respondents’ Motion for Sanctions is not addressed by the pre-hearing schedule established by the Board and should be stricken.

14. In addition, the Motion for Sanctions violates the Hearing Officer’s February 8, 2006 Order requiring, “[i]n any motion, objection, or other filing related to any discovery problem, respondents’ attorneys must relate the measures taken to resolve the problem with complainant’s attorneys before the filing of the motion.” (Feb. 8, 2006 Order at 2.) Respondents’ attorneys took no steps to resolve the problem with the People’s attorneys before filing the Motion for Sanctions and, therefore, related no such measures in the Motion for Sanctions. The Motion for Sanctions should also be stricken because it does not comply with the Hearing Officer’s February 8, 2006 Order.

Respondents’ Motion for Sanctions Is Without Merit and Should Be Denied

15. Viewed in light of the Rule 101.800(c) factors to be considered in imposing sanctions, Respondent’s Motion for Sanctions is completely without merit.

16. The Rule 101.800(c) factors include (a) the relative severity of the refusal or failure to comply, (b) the past history of the proceeding, (c) the degree to which the proceeding

has been delayed or prejudiced, and (d) the existence or absence of bad faith on the part of the offending party or person. None of these factors support any sanctions against the People:

a. In terms of the relative severity of the People's alleged refusal or failure to comply, the People have not improperly refused or failed to comply with any discovery request. On May 25, 2005, the People filed timely answers to Respondents' discovery, including several hundred pages of backup documentation for their fee petition. While the People also filed objections along with their answers, the Board ruled that those objections were proper. (*See* Nov. 17, 2005 Order at 8) Moreover, the People initiated numerous Rule 201(k) conferences with Respondents in an attempt to informally resolve any differences over the People's objections, even though the objections were proper. As of the Board's September 7, 2006 Order, Respondents had no pending discovery requests for the People to answer.

b. Regarding the past history of the proceeding, the record makes it inescapable that the Respondents were found to have committed knowing, willful or repeated violations of the Act and associated regulations and were ordered to pay a civil penalty and the People's reasonable attorneys' fees and costs. Since the Respondents themselves initiated this dispute over the People's fee petition more than two years ago, Respondents have delayed entry of a final order by filing at least nine discovery pleadings with the Board (all of which were denied) without ever attempting to informally resolve differences with the People before seeking Board intervention. Respondents' abusive motion practice even resulted in the entry of a protective order against Respondents' attorneys requiring that they relate the measures taken to resolve the problem with the People's attorneys before the filing of any further discovery pleadings. (*See* Feb. 8, 2006

Order at 2.) At the same time, the People have never missed a deadline established by rule or order, and have done nothing short of try to resolve this case through numerous attempts at informal discovery dispute resolution and a March 30, 2006 motion for final order.

c. Regarding the degree to which the proceeding has been delayed or prejudiced, the People have not done anything to delay or prejudice the Respondents or this proceeding, nor do Respondents make any specific allegations of such conduct.

d. Lastly, there is no evidence of any bad faith on the part of the People in this case. To the contrary, the People have even attempted to resolve discovery disputes informally pursuant to Rule 201(k) and without Board intervention. The Respondents have ignored all such attempts, even after being ordered by the Hearing Offer's February 8, 2006 Order to participate in such efforts.

17. There is absolutely nothing in or out of the record relative to the Rule 101.800(c) factors that supports imposition of sanctions against the People.

18. Respondents' Motion for Sanctions does not specifically identify any withheld information or document that could conceivably prevent them from properly preparing for hearing on December 12, 2006 (which is still two months away). Respondents' merely make vague, conclusory and unsupported allegations regarding the People's alleged discovery violations and the Respondents' inability to prepare for hearing (see Resp. Motion at 4, ¶¶ 24 and 26), which fall far short of the Rule 101.800(c) factors.

19. The issue of the People's discovery objections that forms the basis for the Motion for Sanctions is identical in every way to the issue that was already conclusively decided by the Board on September 7, 2005 and the Hearing Officer on February 8, 2006. Nothing in the

Motion for Sanctions can change these rulings.

20. For all of these reasons, Respondents' Motion for Sanctions should be denied because it is without merit.

Conclusion

21. Respondents' Motion for Sanctions violates the pre-hearing schedule set forth in the Board's September 7, 2006 Order and the requirement that Respondents' attorneys must relate the measures taken to resolve the problem with the People's attorneys before the filing another discovery pleading set forth in the Hearing Officer's February 8, 2006 Order. The Motion for Sanctions should be stricken on these procedural grounds.

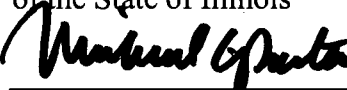
22. Respondents' Motion for Sanctions is also unsupported by any facts or law and, therefore, is without merit. None of the Rule 101.800(c) factors support the Motion for Sanctions, nor did Respondents even address any of these factors. If the Motion for Sanctions is not stricken on procedural grounds, it should be denied on this substantive ground.

WHEREFORE, the People respectfully request that the Board deny Respondents' Motion for Sanctions and for any further relief that is fair and just under the circumstances.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN, Attorney General
of the State of Illinois

BY:



MICHAEL C. PARTEE
Assistant Attorney General
Environmental Bureau/North
188 West Randolph, Suite 2001
Chicago, Illinois 60601
Tel: 312.814.2069
Fax: 312.814.2347
E-Mail: mpartee@atg.state.il.us

CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the **Notice of Filing** and **Complainant's Response to Respondents' Motion for Sanctions**, were sent by First Class Mail, postage prepaid, to the persons listed on the Notice of Filing on October 13, 2006.

BY: 

MICHAEL C. PARTEE

It is hereby certified that the above documents were electronically filed with the following person on October 13, 2006:

Pollution Control Board, Attn: Clerk
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

BY: 

MICHAEL C. PARTEE